

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

UNITED STATES OF AMERICA,

CASE NO. CR18-137RSM

Plaintiff,

ORDER DENYING DEFENDANT'S MOTION TO DISMISS

JOSE MARCELINO
BATRES-LANDAVERDE,

Defendant.

This matter is before the Court on Defendant Jose Marcelino Batres-Landaverde's Motion to Dismiss. Dkt. #27. Defendant is charged with one count of violating 8 U.S.C. § 1326(a) by illegally reentering the United States after deportation. Dkt. #16. Defendant seeks dismissal of that charge by attacking his underlying deportation order under 8 U.S.C. § 1326(d). Defendant argues that the "Notice to Appear" in his removal proceeding was statutorily deficient because it did not identify a time for him to appear, that the immigration court resultantly lacked jurisdiction, and that his initial removal order is therefore void. Dkt. #27.

Defendant's argument relies on *Pereira v. Sessions* and the Supreme Court's explanation that “[a] putative notice to appear that fails to designate the specific time or place of the

1 noncitizen's removal proceedings is not a 'notice to appear under section 1229(a).'" ____ U.S. ___,
2 138 S.Ct. 2105, 2113–14 (2018).

3 Numerous courts around the Country have grappled with similar arguments in the wake
4 of *Pereira*, leading to mixed results. However, the uncertainty has been resolved within the Ninth
5 Circuit by the recent opinion in *Karingithi v. Whitaker*, 2019 U.S. App. LEXIS 2775 (9th Cir.
6 Jan. 28, 2019). Defendant acknowledges this in a footnote. Dkt. #27 at 1 n.1. In *Karingithi*, the
7 Ninth Circuit considered a notice to appear that did not specify the "time and date" of the removal
8 proceedings. The Ninth Circuit concluded that, at least where the alien received actual notice of
9 the time and date of the removal proceedings, the notice to appear was sufficient to vest
10 jurisdiction in the immigration court under the applicable statutes and regulations. In so holding,
11 the Ninth Circuit interpreted *Pereira* as resolving the narrow issue before the Supreme Court:
12 "what information a notice to appear must contain to trigger the stop-time rule, which determines
13 whether a noncitizen has been continuously present in the United States long enough to be
14 eligible for cancellation of removal." *Id.* at *5. The Ninth Circuit concluded that *Pereira* did not
15 impact its determination of whether the immigration court had jurisdiction in a particular case.
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17 Defendant argues that "*Karingithi* is neither controlling nor precedential, because it was
18 wrongly decided and it failed to follow Supreme Court authority on how a Court must review
19 agency action such as the regulations here." Dkt. #27 at 9. Defendant contends that the Ninth
20 Circuit improperly relied on a regulation, rather than a statute, in reaching its conclusions, and
21 that the regulation exceeded the authority permitted under 8 U.S.C. § 1229(a)(1)(G)(i), contrary
22 to the separation of powers and non-delegation doctrine. Defendant further contends that
23 *Karingithi* is not on point because it did not involve a criminal prosecution.
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1 The Court finds that *Karingithi* is controlling and precedential, and the Court will not
2 deviate from its prior ruling on this subject. *See United States v. Garcia-Lara*, CR18-138RSM,
3 Dkt. #63 (Jan. 29, 2019). Even if Defendant were to convince the Court that *Karingithi* was
4 wrongly decided, the Government correctly points out that Defendant failed to exhaust available
5 administrative remedies by contesting removability during his removal hearing or appealing the
6 removal order to the Board of Immigration Appeals, and that he affirmatively waived his right
7 to appeal. *See* Dkt. #30 at 6. Demonstrating such exhaustion is required for a collateral attack
8 under 8 U.S.C. § 1326(d).

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10 Accordingly, having reviewed the record and for the reasons stated above, the Court finds
11 and ORDERS that Defendant's Motion to Dismiss (Dkt. #27) is DENIED.

12 DATED this 12 day of March, 2019.
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16 RICARDO S. MARTINEZ
17 CHIEF UNITED STATES DISTRICT JUDGE
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